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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/193,653 11/17/98 MARSHALL

W F01936US4

EXAMINER

HM12/0413

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DES MOINES IA 50309-2721

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ART UNIT

PAPER NUMBER

1645

DATE MAILED:

04/13/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

**Advisory Action**

Application No.

**09/193,653**

Applicant(s)

**Marshall**

Examiner

**Robert A. Zeman**

Group Art Unit

**1645****THE PERIOD FOR RESPONSE: [check only a) or b)]**

- a) ☐ expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b) ☒ expires either three months from the mailing date of the final rejection, or on the mailing date of this Advisory Action, whichever is later. In no event, however, will the statutory period for the response expire later than six months from the date of the final rejection.

Any extension of time must be obtained by filing a petition under 37 CFR 1.136(a), the proposed response and the appropriate fee. The date on which the response, the petition, and the fee have been filed is the date of the response and also the date for the purposes of determining the period of extension and the corresponding amount of the fee. Any extension fee pursuant to 37 CFR 1.17 will be calculated from the date of the originally set shortened statutory period for response or as set forth in b) above.

- ☐ Appellant's Brief is due two months from the date of the Notice of Appeal filed on \_\_\_\_\_ (or within any period for response set forth above, whichever is later). See 37 CFR 1.191(d) and 37 CFR 1.192(a).

**Applicant's response to the final rejection, filed on Apr 2, 2001 has been considered with the following effect, but is NOT deemed to place the application in condition for allowance:**

- ☐ The proposed amendment(s):
- ☐ will be entered upon filing of a Notice of Appeal and an Appeal Brief.
  - ☐ will not be entered because:
    - ☐ they raise new issues that would require further consideration and/or search. (See note below).
    - ☐ they raise the issue of new matter. (See note below).
    - ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal.
    - ☐ they present additional claims without cancelling a corresponding number of finally rejected claims.

**NOTE:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- ☐ Applicant's response has overcome the following rejection(s):

\_\_\_\_\_  
\_\_\_\_\_

- ☐ Newly proposed or amended claims \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment cancelling the non-allowable claims.
- ☒ The affidavit, exhibit or request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
Applicant's arguments are predicated on a 1.132 Declaration that has not been considered (see below).

- ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

- ☒ For purposes of Appeal, the status of the claims is as follows (see attached written explanation, if any):

Claims allowed: \_\_\_\_\_

Claims objected to: \_\_\_\_\_

Claims rejected: 1-19

- ☐ The proposed drawing correction filed on \_\_\_\_\_ ☐ has ☐ has not been approved by the Examiner.

- ☐ Note the attached Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_

- ☒ Other *The 37 CFR 1.132 Declaration filed on 4-2-2001 has not been considered since it is directed toward the rejection over prior art as made in the first Office Action and there is no reason it could not have been presented earlier.*

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### **ADVISORY ACTION**

Applicant's Request for Reconsideration filed on 4-2-2001 is acknowledged. The 37 CFR 1.132 Declaration filed on 4-2-2001 will not be considered because good and sufficient reasons why it was not earlier presented have not been shown. Said Declaration should have been presented in response of the Office Action mailed 7-3-00 (Paper No. 5).

### ***Claim Rejections Maintained***

The rejection of claims 1-19 under 35 U.S.C. 103(a) for being unpatentable over De Vuyst et al (Microbiology Vol. 142. 1996, pages 817-827) is maintained for reasons of record.

The rejection of claims 1-15 and 17-19 under 35 U.S.C. 103(a) for being unpatentable over De Vuyst et al (Microbiology Vol. 142. 1996, pages 817-827) in view of Nanji (US Patent 5,413,785) is maintained for reasons of record.

The rejection of claim 16 under 35 U.S.C. 103(a) for being unpatentable over De Vuyst et al (Microbiology Vol. 142. 1996, pages 817-827) in view of Perdigon et al. (Journal of Food Protection Vol 53 No. 5, pages 404-410, 1996) or Emery et al. (U.S. Patent 5,538,733) is maintained for reasons of record.

### ***Conclusion***

**No claim is allowed.**

The shortened statutory period for reply expires THREE MONTHS from the mailing date of the final rejection or as of the mailing date of this advisory action, whichever is later. In no

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event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Any extension fee required pursuant to 37 CFR 1.17 will be calculated from the date that the shortened statutory period for reply expires as set forth above.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert A. Zeman whose telephone number is (703) 308-7991. The examiner can be reached between the hours of 7:30 am and 4:00 pm Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, Donna Wortman, Primary Examiner can be reached at (703) 308-1032 or the examiner's supervisor, Lynette Smith, can be reached at (703)308-3909.



DONNA WORTMAN  
PRIMARY EXAMINER

Robert A. Zeman

April 12, 2001